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IN THE

Supreme Court of the United States

October Term, 1970

No. 975

BARNEY R. COLSON, ET AL,
Petitioners,

v.

WALTER J. HICKEL, Secretary of the Interior
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Petitioner, Barney R. Colson, et al., respectfully moves this court for an order vacating its denial of the Petition of Certiorari, entered on February 22, 1971, and requests that this Court grant the said petition. Petitioner submits that there are special and important reasons for the requested action and that a subsequent decision of this Court supports the request.

Petitioner Has Been Deprived Of Access To The Courts

This Court has always viewed with deep concern any denial of access to the Courts. It has jealously guarded the right of the people of the United States to judicial review of arbitrary actions of the Executive Branch of Government in the administration of Federal laws, particularly where there are no alternate avenues of redress.[1] This Court has uniformly held that access to judicial review of the administrative process is necessary in order to satisfy the demands of due process *Yakus v. United States* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

Petitioner has been denied judicial review of an administrative decision of a Federal Officer The Secretary of the Interior. That right was denied by the lower Court and the Fifth Circuit solely on the theory of sovereign immunity.[2] That denial is in direct conflict with decisions of at least three other circuits as well as with decisions of this Court.

The ninth Circuit, as well as the Tenth and District of Columbia Circuits, have consistently reviewed decisions by the Secretary of the Interior in his administration of the public land laws. None applied the doctrine of

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[1] Petitioner has no alternate remedy. Further, the denial of access to the Courts permits the Federal Government, by the action of its agent, the Secretary of the Interior, to dishonor obligations established by the Congress.

[2] As discussed *infra* the Secretary's decision was limited to the threshold question of the legal meaning of certain documents and the powers and rights which the documents gave to Colson. It never involved even the remotest suggestion of areas that would raise a question of sovereign immunity. *Barney R. Colson*, 70 I.D. 409 (1963).

sovereign immunity to preclude review where the Secretary's action was the result of an administrative proceeding pursuant to the public land laws. This court and every Circuit Court except the Fifth has properly treated the decision of the Secretary as an agency action reviewable under the provisions of the Administrative Procedure Act. *Ickes v. Virginia Colorado Development Corp.*, 295 U.S. 639, 55 S.Ct. 888, 79 L.Ed. 1627 (1935); *Wilbur v. U.S. ex rel Krushnic*, 280 U.S. 306, 50 S.Ct. 103, 74 L.Ed. 445 (1930); *State of Washington v. Udall*, 417 F.2d 1310, 9th Cir. (1969);[3] *Heffelman v. Udall*, 338 F.2d 109, 10th Cir. (1967); *Coleman v. United States*, 363 F.2d 190, 9th Cir. (1966); *Ferry v. Udall*, 336 F.2d 706, 9th Cir. (1964), cert.denied 381 U.S. 104, 85 S.Ct. 1449, 14 L.Ed.2d 186; *Adams v. Witmer*, 271 F.2d 29, 9th Cir. (1958); *Southwestern Petroleum Corporation v. Udall*, 361 F.2d 650, 10th Cir. (1966); *Finch v. U.S.*, 387 F.2d 13, 10th Cir. (1966), cert. denied 390 U.S. 1012, 88 S.Ct. 1262, 20 L.Ed.2d 162; *Texaco, Inc. v. Hickel*, ____ F.2d ___C.A.D.C., Case No. 23097 decided August 19, 1970; *West Coast Exploration Company v. McKay*, 213 F.2d 582 C.A.D.C. (1954). Cert. denied 347 U.S. 989, 74 S.Ct. 850, 98 L.Ed. 1123 (1954).

The Ninth Circuit discussed the applicability of the Administrative Procedure Act to decisions of the Secretary of the Interior in *Converse v. Udall*, 399 F.2d 616, 9th Cir. (1968); cert. denied 393 U.S. 1025, 89 S.Ct. 635, 21 L.Ed.2d 569. There, it said:

> "However, we have held that the Administrative Procedure Act does apply, *Adams*

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[3] The fifth Circuit withheld its decision in the case pending disposition of certiorari in the *State of Washington* case. The Courts's letter is attached as Appendix 1. In its decision. The Fifth Circuit, at footnote 1, specifically noted the contrary decision of the Ninth Circuit in the *State of Washington* case.

> v. *Wimer*, 9 Cir., 1958, 271 F.2d 29, 32-33; *Coleman* v. *United States*, *supra*, 363 F.2d at 194. The portion of our decision in *Coleman* dealing with the Administrative Procedure Act was not questioned by the Supreme Court. See also *Foster* v. *Seaton*, 1959, 106 U.S. App. D.C. 253, 271 F.2d 836, cited with apparent approval in *West* v. *Humboldt Placer Mining Co.* 1963, 371 U.S. 334, 338 n.7, 83 S.Ct. 379, 9L.Ed.2d 350. Cf. *Chouinos* v. *United States*, 10 Cir., 1964, 335 F.2d 918."

There is, therefore, a clear conflict between the Fifth Circuit holding in this case and determinations by other circuit courts concerning the right to judicial review pursuant to Section 701 of the Administrative Procedure Act (5 USC Sect. 701) of decisions of the Secretary of the Interior in connection with the disposition of applications in connection with his administration of the public land laws.

Colson presented to this Court the question as to whether a decision of the Secretary of the Interior acting in his capacity of administering the Federal Land Laws and processing applications in connection therewith, is immune from judicial review as was determined by the Fifth Circuit. It would seem that there is no question that actions of the Secretary of the Interior are no more immune from judicial review than any other administrative agency or department acting in an administrative capacity.

Yet the lower Court and the Fifth Circuit are now free to discard this established principle of law, at least insofar as the Secretary of the Interior is concerned. This would appear to be grossly out of step with the present day concept of justice and due process for it means that a citizen can be deprived of due process through the

arbitrary decision of an administrative officer and the unrestricted application of the Doctrine of Sovereign Immunity. Such a concept was flatly rejected by the D.C. Circuit in *West Coast Exploration Co. v. McKay*, 213 F.2d 582, 596, C.A.D.C. (1954). There it was argued that the Doctrine of Sovereign Immunity precluded review of a decision of the Secretary of the Interior under the rule of *Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1928 (1949). The Court stated:

> "Such a Denial of Recourse to the courts would be abhorrent to the justice according to law contemplated by the Constitution. The due process clause of the Fifth Amendment endows the United States courts with power, even though there is no statutory provision for direct review of the action of a public officer, to protect against arbitrary action by such an officer."

Recognition of such rights as being those protectable by the due process provisions of the Administrative Procedure Act authorizing judicial review of an agency action by the Secretary of the Interior was specifically recognized by the Ninth Circuit. In *Coleman v. United States*, 363 F.2d 190, 9th Cir. (1966),[4] where the Doctrine of Sovereign Immunity was invoked by the Secretary to block review of his decision. With respect to

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[4] Reversed on other grounds, 390 U.S. 599, 88 S.Ct. 1327, 30 L.Ed. 2d 170 (1968), without effect on the portion of the *Coleman* decision dealing with the Administrative Procedure Act which was not questioned by the Supreme Court. See *Converse v. Udall*, 9th Cir. (1968) 399 F.2d 616, Cert. Den. 393 U.S. 1025, 89 S.Ct. 635, 21 L.Ed.2d 569 (1969).

the parties right to obtain judicial review of the Secretary's denial of the party's rights, the Court said:

> "... it is not a right which the Secretary of the Interior may, in his discretion, ignore or which he may reject 'in the absence of fraud or imposition'. This is precisely the kind of right which the Administrative Procedure Act, with its provisions for judicial review, was designed to safeguard from arbitrary, capricious, and illegal deprivation by action of executive and administrative agencies. *Adams* v. *Witmer* 9 C.C.A. 1959, 271 F.2d 29." (P.196)

Therefore, the denial of access to the courts in order to obtain judicial review is a denial of due process and in conflict with the decisions of this Court as well as with decisions in the Ninth and Tenth Circuits and the District of Columbia Circuit.

The Issue, As Framed By The Solicitor, was Grossly Misleading

Perhaps the difficulty in this case is the fact that the Solicitor General chose to distort the issue.[5] The question presented, according to the Solicitor was:

> "Whether a suit to *compel the Secretary of the Interior to issue a patent to particular public lands* of the United States is an unconsented suit against the United States

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[5] In addition, the Solicitor's brief at page 6 improperly argued the merits of the case below which are the very matters as to which Petitioner has been denied review. The Solicitor's arguments are not supported by the law and this would have been shown had judicial review been permitted.

> when the Secretary, in rejecting the claim, was acting within the the valid delegation of a constitutional Statute." (Emphasis supplied)

The Solicitor knows full well that the issue never involved compelling the Secretary to issue any patents whatsoever much less compel him to issue patents to particular public lands. Indeed, the parties have stipulated throughout this case that Section 7 of the Taylor Grazing Act (43 USC 315(f)) is applicable and that its requirements would have to be met by the Secretary *prior* to the issuance of any patent. Section 7 gives the Secretary discretion as to how lands should be classified and that action is a pre-requisite to the issuance of patents in response to applications. Therefore the action here never involved the issuance of patents by the Secretary simply because he never reached the position of even considering the issuance of patents, a fact that it made clear by his own decision. He said:

> "In view of the fact that Colson has not established his right to locate public lands under the certificates, it becomes unnecessary to consider the Director's additional holding or Colson's arguments that certain of the lands which he applied to select are available for selection in satisfaction of the outstanding scrip rights." (Petitioners Brief Appendix G-15)

The Secretary's decision involved the rejection of a threshold application on an arbitrary interpretation as to the *legal* rights contained in Petioners documents that finds no support in statutory or case law. In fact, the Secretary's decision was contrary to the decision of this Court (Midway v. Eaton, 183 U.S. 602, 22 S.Ct. 261, 43 L.Ed. 347 (1902), as well as a decision of the Department of the Interior on the very point in question (Kean, Interior Decision D-29200, April 29, 1914).

Nevertheless the lower Court held, with no elaboration whatsoever, that "this action is a suit against the United States, which is not a party and has not waived its sovereign immunity."[6] The Fifth Circuit held that "prior decisions of this Court, relying upon decisions of the Supreme Court, *require* us to hold that this was, in fact, a suit against the United States, to which it had not given its consent." (Emphasis supplied). But none of the decisions cited by the Fifth Circuit involved an administrative proceeding and no Fifth Circuit decisions and certainly no decisions of the Supreme Court "require" a holding that the action was a suit against the United States and therefore, precluded by the Doctrine of Sovereign Immunity. Indeed, such a determination is inconceivable in light of this Court's consistent position with respect to the right of a citizen to obtain judicial review of an arbitrary decision by an administrative agency.

The most recent case that made this abundantly clear was handed down by this Court on March 2, 1971. *Citizens To Preserve Overton Park, Inc., et al., v. Volpe, Secretary Department of Transportation, et al.*, (Case No. 1066). There, a group of private citizens as well as conservation organizations argued that the Secretary had violated the Department of Transportation Act and the Federal Aid to Highways Act in authorizing construction of an interstate highway through a public park in Memphis, Tennessee.

This Court stated that the threshold question whether petitioners were entitled to any judicial review "was easily answered" pointing out that Section 701

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[6] The same lower Court had earlier *rejected* the defense of sovereign immunity in denying the Secretary's Motion to Dismiss which was argued in Court *on the very same facts.*

of the Administrative Procedure Act provides that the action of each authority of the United States is subject to judicial review except where there is a statutory prohibition of review or where agency action is committed to agency discretion by law. In the *Overton* case, (as in this one) there was no indication whatsoever that Congress sought to prohibit judicial review nor was there any evidence of legislative intent to restrict access to judicial review. With respect to the question of discretionary action, this Court pointed out that it is a very narrow exception and is applicable only in those rare cases where statutes are drawn in such broad terms that in a given case there is no law to apply. Such is not the case here.

Thus, with these guidelines in mind and with the prior decisions of this Court in the cases of *Abbott Laboratories v. Gardner*, 387 U.S. 136 87 S.Ct. 1507, 18 L.Ed. 2d 681 (1967) and *Brownell v. We Shung*, 352 U.S. 180, 77 S.Ct. 252, 1 L.Ed. 2d, 225 (1956) there should be no question that Colson is, in fact, entitled to judicial review.

This Court should not allow to stand the position taken by the Fifth Circuit that decisions of this Court *require* a holding that a decision of the Secretary of the Interior, (no matter how arbitrary) is not subject to review by the judiciary. The Fifth Circuit decision is wrong. *No* decision of this Court has ever reached such a conclusion.

The denial by this Court of the petition for certiorari results in a denial of due process contrary to Constitutional safeguards and protective legislative statutes such as the Administrative Procedure Act. Further, it perpetuates a clear conflict between the Fifth Circuit and decisions of other circuits as well as decisions of this Court.

Judicial review should not be dependent on the Circuit in which judicial relief is sought. This Court has never tolerated the existence of such a condition. It should not do so now.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, the petitioner prays that the Court grant rehearing of the order of denial, vacate that order, grant the petition, and review the judgment and opinion below.

Respectfully submitted,

BARNEY R. COLSON, ET AL

By /s/ Richard Hildreth
Richard Hildreth

By /s/ James E. Rodgers
James E. Rodgers

MARCH 26, 1971

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

RICHARD HILDRETH
Attorney for Petitioner

Appendix I

Fifth Circuit Notice Withholding Decision Pending Certiorari in *State of Washington v. Udall*, 417 F.2d 1310, 9 Circuit, 1969, and Solicitor General Notice Not To Seek Certiorari Therein

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March 26, 1970

Re: No. 26212 *Barney R. Colson, et al, vs. Walter J. Hickel, etc.*

Gentlemen:

At the direction of the court I am writing to advise that the decision in the above referenced case is being withheld pending disposition of certiorari in *State of Washington vs. Udall* 417 F.2d 1310, 9 Cir., 1969.

As soon as a decision is rendered in this court in this case, a copy of the printed opinion will be forwarded to you.

Very truly yours,

Edward W. Wadsworth, Clerk

by Ldia G. Comberrel

LGC:cms

cc: Mr. Edward F. Boardman
Hon. Ramsey Clark
Mr. Herbert Pittle
Mr. Roger P. Marquis
Mr. Shiro Kashiwa